Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT LOUIS STEVENSON,

Petitioner,

v.

THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, THE DISTRICT OF COLUMBIA, ALBERT GONZALES, ALAN HILL, JOHNNY GAY, LEWIS HAGLER, AND DEMETRIUS COLE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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July 30, 2001

30 pp

QUESTION PRESENTED

Whether evidence of the reasons an excessive force victim acted as he did is admissible in a section 1983 suit against the officers who allegedly used excessive force.

PARTIES TO THE PROCEEDING

Petitioner Robert Louis Stevenson was the plaintiff/appellant below. Respondents the District of Columbia, the District of Columbia Metropolitan Police Department, Albert Gonzales, Alan Hill, Johnny Gay, Lewis Hagler, and Demetrius Cole were the defendants/appellees below. The United States Department of Justice also appeared below to oppose a third-party subpoena served by Mr. Stevenson.

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INTRODUCTION

The respondent police officers shot at petitioner Robert Stevenson *63 times* as he attempted to drive away from them. When Mr. Stevenson sued the respondents for their use of excessive force, the district court admitted evidence that – unknown to the officers – a passenger in Mr. Stevenson's car was in possession of a submachine gun at the time of the incident. This evidence was irrelevant to the objective reasonableness of the officers' decision to use deadly force, because it is undisputed that the officers were never threatened by the gun, and were not even aware of its existence at the time of the shooting. The admission of the gun had a devastating prejudicial effect, however, because it turned a trial that should have been about the defendants' actions into a trial on Mr. Stevenson's character. As a result, a serious constitutional violation went unpunished.

The court of appeals justified that result by holding that the gun was admissible with respect to Mr. Stevenson's motive for fleeing from the police. By doing so, the D.C. Circuit split from decisions of other courts of appeals holding that evidence of the reasons an excessive force victim acted as he did is irrelevant and unfairly prejudicial. What matters is whether the facts known to the officers justified the use of deadly force; not what the victim had on his mind at the time.

This point is critical because fairness demands that the jury's attention be focused on the reasonableness of the defendants' actions – not on inflammatory evidence regarding the victim. Because the D.C. Circuit departed from this basic principle, and conflicted with decisions of other courts of appeals in doing so, this Court should grant *certiorari* to consider this important and recurring question of law.

OPINIONS BELOW

The decision of the Court of Appeals for the District of Columbia Circuit is reported at 248 F.3d 1187 and reprinted in

the Appendix ("App.") at App. 1a. The final judgment of the district court is reprinted at App. 9a.

JURISDICTION

The court of appeals issued its opinion on May 1, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution, 28 U.S.C. § 1983, and Federal Rules of Evidence 402 and 403 are reprinted in the Appendix at App. 10a.

STATEMENT OF THE CASE

A. The Underlying Events

On the evening of March 7, 1996, Robert Stevenson and Larry Wallace borrowed a Chrysler New Yorker from a friend, Anthony Moore. After running some errands, the two stopped at a McDonald's restaurant. *See* J.A. 201-02. While they were in the drive-through line, an off-duty police officer observed that the car's passenger-side window was broken. By checking the license plate number with the police department, he determined that – unbeknownst to Mr. Stevenson – the car had been stolen. The officer instructed the McDonald's staff to stall Mr. Stevenson, and called for backup. *See id.* at 300-05.

Just after Mr. Stevenson received his food, a police car pulled in front of the Chrysler. Two officers jumped out with guns drawn and began shouting. A third officer came out of the McDonald's and pointed his gun at Mr. Stevenson. A fourth armed officer approached from the rear of the Chrysler. J.A. 207, 308-09, 323-24. Terrified and unaware why the police were approaching him with guns drawn, Mr. Stevenson attempted to flee. He backed up until he bumped into the car behind him, pulled forward, back again, and turned around to flee in the opposite direction. As he turned the car around, an officer yelled "shoot, shoot, shoot." *See id.* at 207, 257, 267-68.

Officers and neutral eyewitnesses testified that the officers fired on the vehicle from the rear, as it turned to flee. *See* J.A. 242-43, 269-70, 341-43, 345, 366. A neutral eyewitness testified that the officers were three to six feet from the car when they fired. *See id.* at 261. Mr. Stevenson and a neutral eyewitness testified that the officers continued shooting even after the car came to rest. *See id.* at 208, 240-41, 243. One of the officers admitted that after the car came to a standstill, he continued to fire on it until he ran out of bullets. *See id.* at 346-47.

The officers fired at Mr. Stevenson a total of 63 times. *See* J.A. 294-99. One bullet hit a nearby car in which a pregnant woman and child were riding. *See id.* at 265-66, 272. Another bullet crashed through a McDonald's pick-up window. *See id.* at 247, 248-49, 274-75. A neutral eyewitness testified that by the time the shooting stopped, the car was "full of holes like swiss cheese . . . . Everything was shot up: the tires, the doors, the windows, the hood and the trunk." *Id.* at 252.

Mr. Stevenson was shot in his chest, left arm, right hand, and left leg. He spent a month in the hospital, and suffered permanent nerve damage, loss of mobility in his left arm, and other physical disabilities. *See id.* at 212-14, 235-36.

The officers later testified that they opened fire because Mr. Stevenson had used his car as a deadly weapon by driving toward them, and thereby put them in fear for their safety. *See* J.A. 310-11, 326-28. One officer testified that the car actually hit him, and that he was then thrown on the hood of the car before falling off. *See id.* at 350-51. In contrast, Mr. Stevenson testified that he did not point the car at the officers, but instead turned away from them in an attempt to escape. *See id.* at 232-33. The neutral eyewitnesses likewise testified that no officers were directly in front of the car, or otherwise in danger. *See id.* at 246, 254, 262. Nor did they ever see the car hit an officer. *See id.* at 243, 251, 258, 260. Even one of the officers agreed that he never saw an officer on the hood of the car. *See id.* at 330.

B. The Proceedings Below

In November 1997, Mr. Stevenson filed suit against the Metropolitan Police Department, the District of Columbia, and the five officers who were present at the scene. He alleged a number of causes of action, including claims under 28 U.S.C. § 1983 based on violations of the Fourth Amendment. The district court had federal question jurisdiction over Mr. Stevenson's section 1983 claims and supplemental jurisdiction over his state-law claims. *See* 28 U.S.C. §§ 1331 & 1367.

Before the trial began, the defendants disclosed that they intended to introduce into evidence a Cobray MAC 11 semi-automatic submachine gun that was found after the shooting on the person of Larry Wallace, the passenger in the Chrysler driven by Mr. Stevenson. This weapon measures 11½ inches from muzzle to butt, and about the same distance from the top of the gun to the bottom of the magazine. *See* J.A. 291-92.

It is undisputed that Mr. Wallace did not brandish the firearm during the shooting. It is also undisputed that none of the officers was even aware of its presence until after the shooting, when a crime scene investigator found it in Mr. Wallace's possession. Thus, the defendants stipulated that the weapon was "not a factor in the decision to use deadly force," and that "[n]o defendant was threatened" by the gun or even "observed the [gun] until after the shooting had stopped." J.A. 127, 401-02.

In light of these facts, Mr. Stevenson moved *in limine* to bar introduction of any evidence concerning the gun. Mr. Stevenson explained that because the officers were unaware of the gun at time of the shooting, the gun is irrelevant under Federal Rule of Evidence 402 and unfairly prejudicial under Federal Rule of Evidence 403. *See* J.A. 41-42. The district court denied the motion, and ruled that "Larry Wallace's possession of a gun during the events in question is more probative than prejudicial as evidence of the plaintiff's desperation, as a convicted felon on parole who is in the

presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon and is admissible in the government's case in chief." *Id.* at 116.

At trial, the district court not only allowed the defendants to present testimony that the weapon was found on Mr. Wallace after the shooting; it allowed the weapon itself to be brought into the courtroom and demonstrated in front of the jury. *See* J.A. 291-92. At the close of the trial, the jury rendered a verdict in favor of the defendants, upon which the district court entered judgment.

Mr. Stevenson then appealed to the D.C. Circuit. On May 1, 2001, the court of appeals affirmed the district court's judgment. The D.C. Circuit held that the submachine gun was relevant because "it tends to support the proposition that Stevenson was intent on escaping at all costs and in so doing placed the officers at risk." App. 6a. Thus, the court determined that "the gun was probative of an important issue in this case, namely which version of the events – Stevenson's or the officers' – was true." *Id.* at 7a. The court of appeals also upheld the district court's ruling that the unfairly prejudicial effect of the submachine gun did not substantially outweigh its probative value. *See id.* at 6a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE ADMISSIBILITY OF EVIDENCE REGARDING THE REASONS THAT AN EXCESSIVE FORCE VICTIM ACTED AS HE DID.

The court of appeals' decision conflicts with holdings of other courts of appeals on the admissibility of the reasons an excessive force victim resisted arrest. The root of this conflict is this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989), that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

at 396; *accord Saucier v. Katz*, 121 S. Ct. 2151, 2158 (2001). The ultimate question is whether, based on the facts known to the officers at the time of the incident, deadly force is necessary to prevent "serious bodily harm or death," or to prevent the escape of a felon who "poses a significant threat of death or serious physical injury . . . ." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

Based on *Graham* and *Gardner*, a number of circuits have held that if the defendants were unaware of the plaintiff's motivation at the time they used force, evidence of that motivation is inadmissible hindsight evidence. For example, the Seventh Circuit excludes all evidence of motive to resist arrest, even when the fact of resistance is disputed. As that court has explained, "the law in this circuit [is that] when considering a charge of excessive force, evidence outside the time frame of the shooting is irrelevant and prejudicial." *Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997) (citing *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (*en banc*)).

Palmquist involved the police shooting of an emotionally distraught individual who threatened police officers with a fan blade and a pipe. The defendants sought to introduce evidence that Palmquist had informed others of his intention to commit "suicide by police." They reasoned that "this character evidence of Palmquist's 'motive' and 'intent' would allow them to present a self-defense claim, . . . and to show that Palmquist's conduct was the sole proximate cause of his being shot." *Palmquist*, 111 F.3d at 1339. The Seventh Circuit held that such evidence was irrelevant as a matter of law, and was also unfairly prejudicial:

> The excluded evidence would have shifted the jury's attention from Palmquist's behavior at the scene, which [was] material in judging the objective reasonableness of [the] use of force, to information not possessed by [the defendants] . . . . [E]vidence relating to the plaintiff's mental and emotional state . . . is not admissible in judging the use of excessive force. Because the excluded

> evidence in this case occurred outside the presence of the police, they had no personal knowledge of it.

Id. at 1340; *see also Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir. 1992) (same); *Rascon v. Hardiman*, 803 F.2d 269, 278 (7th Cir. 1986) (same); *Sherrod v. Berry*, 856 F.2d 802, 807 (7th Cir. 1988) (reversing as abuse of discretion the admission of hindsight evidence offered under similar circumstances). For these reasons, the Seventh Circuit "absolutely forbids" the admission of evidence to show the plaintiff's motive to resist arrest. *Palmquist*, 111 F.3d at 1348 (Ripple, J., concurring in part and dissenting in part).

The Seventh Circuit's holding in *Palmquist* cannot be reconciled with the decision in this case. The D.C. Circuit not only upheld the admission of such evidence, it did so on the ground that the presence of the gun "tends to support the proposition that Stevenson was intent on escaping at all costs and in so doing placed the officers at risk." App. 6a. The Seventh Circuit has rejected that very argument. Specifically, the partial dissent in *Palmquist* argued that motive evidence "make[s] it more likely that [plaintiff's] physical behavior at the scene that night was sufficiently aggressive to create a reasonable belief . . . that deadly force was necessary." *Palmquist*, 111 F.3d at 1348 (Ripple, J., concurring in part and dissenting in part). The majority rejected that rationale – on which the D.C. Circuit now relies. *See id.* at 1340. In doing so, the Seventh Circuit cited its earlier decision in *Wallace,* which explains that what matters in an excessive force case is the objective facts perceived by the officers, "not a psychiatric prediction about how someone like [the victim] might have behaved." 957 F.2d at 336.

The First Circuit has also held that evidence of motive to resist is inadmissible. In *Wierstak v. Heffernan*, the defendants sought to introduce evidence that the plaintiff had engaged in a drug transaction before fleeing from the arresting officer, and therefore "had a motive for resisting arrest." 789 F.2d 968, 972 (1st Cir. 1986). The First Circuit held that because it was

undisputed in that case (as in this case) that the plaintiff had fled from the arresting officer, evidence of the drug transaction was irrelevant to the reasonableness of the officer's conduct. *See id.* at 973. Such evidence would simply inject a "collateral, irrelevant, prejudicial issue before the jury." *Id.* at 973.

Similarly, in *Senra v. Cunningham*, the defendants sought to introduce evidence of a fleeing suspect's prior conviction for drunk driving on the theory that it was "relevant to [plaintiff's] motivation for leaving the scene of the accident." 9 F.3d 168, 172 (1st Cir. 1993). The First Circuit rejected that contention, and explained that the plaintiff's "motivation for leaving the scene was irrelevant . . . to any disputed issue in the case." *Id.*

The Eighth Circuit has followed a similar approach in upholding the exclusion of evidence regarding the crime with which the excessive force victim was charged. *See Cummings v. Malone*, 995 F.2d 817, 823 (8th Cir. 1993). The court rejected the contention that such evidence is admissible "to explain why [the plaintiff] reacted as he did" at the time of the alleged excessive force. *Id.* at 823. Motive evidence would do "little to make it more likely that the officers, and not [the plaintiff], were telling the truth." *Id.*

In the Ninth Circuit, the question remains unsettled because different panels have rendered conflicting decisions. In *McKenzie v. City of Milpitas*, the defendants sought to introduce evidence of a prior domestic dispute that had a bearing on the plaintiff's motive to resist the police. 953 F.2d 1387, 1992 WL 19813, at *5 (9th Cir. 1992) (unpublished opinion). The Ninth Circuit held that "because none of the officers present at the . . . incident had known of the prior disputes . . . the evidence was *completely irrelevant* to the central question bearing on the constitutional issue – whether the officers had acted reasonably on that occasion." *Id.* (emphasis added).

But in *McCoy v. Payne*, a different panel of the Ninth Circuit upheld a district court's admission of evidence of the plaintiff's aggressiveness shortly before the police arrived. 1 F.3d 1246,

1993 WL 269613, at *1-2 (9th Cir. 1993) (unpublished opinion). The court reasoned that although the plaintiff's prior behavior was unknown to the police at the time, it "g[ave] rise to a very strong inference of [the plaintiff's] demeanor during the confrontation" with the officer. *Id.* at *1.

In sum, there is both an inter-circuit and an intra-circuit conflict on this important question. This Court's guidance is needed.

II. THIS PETITION PRESENTS A RECURRING QUESTION OF FEDERAL LAW THAT IS CENTRAL TO THE FAIR ADJUDICATION OF SECTION 1983 CASES.

The admissibility of motive evidence goes to the heart of the fair adjudication of excessive force claims. "The use of deadly force to prevent the escape of all felony suspects, whatever their circumstances, is constitutionally unreasonable." *Garner*, 471 U.S. at 11. Mr. Stevenson deserved to have an impartial jury consider his claim that officers of the Metropolitan Police Department violated this constitutional mandate. Otherwise, the threat of section 1983 suits could not effectively deter abuses.

Nonetheless, the focus of the trial in this case quickly shifted from the defendants' conduct to Mr. Stevenson's character. From opening through closing argument, defense counsel relied heavily on the submachine gun. *See, e.g.*, J.A. 191-92. In addition to eliciting testimony about the gun, counsel even brought the gun into the courtroom, handed it to a witness, and had the witness conduct a demonstration of the gun – all before the jury. *See id.* at 291-92.

This evidence destroyed Mr. Stevenson's ability to receive a fair trial in at least two respects. *First*, it improperly colored the jury's perception of the events by focusing their attention on a dangerous weapon, even though the officers were unaware of the weapon and neither Mr. Stevenson nor Mr. Wallace ever made any attempt to use it. *See* page 4, above. As explained

above, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. By allowing the submachine gun into evidence, the trial judge made it impossible for the jurors to place themselves in the shoes of the officers at the scene.

Most importantly, the admission of the submachine gun encouraged the jury to absolve the police officers based solely on their personal disapproval of Mr. Stevenson and Mr. Wallace. Of course, evidence is improper if its purpose is to sway the jury based on the bad character of one of the parties. Such evidence invites the jury "to prejudge one with a bad record and deny him a fair opportunity [to litigate;] [t]he overriding policy of excluding such evidence . . . is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

Evidence of a person's motives for resisting arrest has precisely these effects. The crimes a person is accused of, and the other reasons he has for wanting to avoid contact with the authorities, are irrelevant to whether he subjected the police to a threat of death or serious bodily harm on the occasion at issue. The D.C. Circuit held that such evidence is relevant because there is a meaningful difference between a suspect who is intent on escaping from the police and a suspect who is intent on escaping "at all costs." App. 6a. But there is no dispute that Mr. Stevenson was attempting to flee as quickly as possible; the only question is whether the police officers were standing in his way at the time, and were thus in danger. The reasons Mr. Stevenson attempted to flee are irrelevant to that question. Thus, this is character evidence, plain and simple. And because it is evidence of criminal character, it is highly prejudicial.

Even if there were some marginal relevance to this evidence, its probative value is far outweighed by its prejudicial effect. Evidence is to be excluded when its "probative value is

substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. While trial courts have a degree of discretion in making Rule 403 determinations, *United States v. Abel*, 469 U.S. 45, 54-55 (1984), this Court has not hesitated to find an abuse of discretion when the circumstances call for it. In *Old Chief*, for example, this Court granted *certiorari* to resolve a recurring Rule 403 question, and held that because it was undisputed that the defendant was a felon, the details of a prior conviction were inadmissible under Rule 403. *See* 519 U.S. at 191-92. So too here, this Court should grant *certiorari* and hold that because it was undisputed that Mr. Stevenson attempted to flee, his motive for doing so should have been excluded.

Denial of *certiorari* would cause serious injustice to the victims of excessive force. All of the neutral eyewitnesses agreed that Mr. Stevenson never pointed his car at a police officer, but instead drove away from the officers. *See* page 3, above. Even one of the officers disputed the other officers' story that one of them was struck by Mr. Stevenson's car. *See id.* at 3-4. But after hearing about the Cobray MAC 11 semi-automatic submachine gun, and seeing it demonstrated in the courtroom, the jury returned a verdict for the defendants. Such evidentiary abuse must be stopped if excessive force victims are to receive fair trials.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Robert Louis STEVENSON, Appellant,
v.
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, et al., Appellees.
United States of America, Intervenor.

No. 00-7149.

Argued March 16, 2001.
Decided May 1, 2001.

Before: EDWARDS, Chief Judge, WILLIAMS and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

KAREN LeCRAFT HENDERSON, Circuit Judge:

The appellant, Robert L. Stevenson, brought a section 1983 action, 42 U.S.C. § 1983, against the District of Columbia Metropolitan Police Department (MPD); Sergeant Albert Gonzalez; Officers Demetrius Cole, Alan Hill and Lewis Hagler; Reserve Officer Johnny Gay; and the District of Columbia (collectively, the District) alleging violations of his rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution as well as several state law claims. After the district court granted partial summary judgment to the defendants on some of the claims,[1] the case was tried to a jury which found in favor of the defendants on all remaining counts. The district court entered judgment on the jury verdict.

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[1] Stevenson does not challenge the district court's summary judgment ruling.

Stevenson contends the district court erred during the trial by (1) revealing its view of the facts to the jury, (2) admitting irrelevant and highly prejudicial evidence and (3) excluding important impeachment evidence.[2] For the reasons set forth below, we affirm.

I. BACKGROUND

The case arises from events that occurred on March 7, 1996. According to Stevenson's trial testimony, he and his friend Larry Wallace borrowed a Chrysler New Yorker from a friend and, after running some errands, stopped at the McDonald's restaurant located at 4301 Nannie Helen Burroughs Avenue, N.E., Washington, D.C., to pick up something to eat before returning the borrowed car. After waiting in the drive-through line, they obtained their food and were about to drive away. Before they could, however, they found themselves surrounded by police officers who, with guns drawn, were "hollering" at them. Joint Appendix (JA) 206. Instead of stopping, Stevenson became scared, put the car in reverse, backed up until he bumped into the car behind him, drove forward, backed up again and finally managed to turn the car around heading back toward the *entry* of the drive through lane. At this point, he heard a police officer yell "shoot, shoot, shoot," JA 207, and the Chrysler he was driving became the target of 63 gun shots. Stevenson and Wallace were wounded. Stevenson spent one month in the hospital having been hit in the chest, left arm, right hand and left leg. He now suffers permanent nerve

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[2] In his opening brief, Stevenson also challenged the district court's denial of discovery of certain sealed documents prepared by the United States Department of Justice (DOJ). *See* Brief for Appellant at 33- 36. After the DOJ filed its intervenor brief, Stevenson modified his position, conceding that if, as the DOJ represented, the documents at issue consisted only of factual material provided by the District or comments by DOJ experts, the district court's decision was proper and "there is no dispute here." Reply Brief at 26. On review, we conclude the DOJ's representations were accurate and therefore need not address the discovery issue further.

damage, loss of mobility in his left arm and other physical disabilities.

The police officers testifying at trial told a different story. On March 7 Officer Demetrius Cole was working (off-duty but in uniform) as a security officer at the McDonald's restaurant. He observed Stevenson's vehicle enter the drive-through line and suspected it might be stolen because the passenger side window was broken. Cole placed a call to the MPD to check the license plates. After learning the plates had been reported stolen, he requested back- up and instructed the McDonald's clerk who was processing Stevenson's order to stall him. Within minutes, Officers Alan Hill and Lewis Hagler arrived at the restaurant with their sirens on. They pulled into the exit of the drive- through lane to prevent the car from leaving. Sergeant Albert Gonzalez and Reserve Officer Johnny Gay approached from the back of the line in an attempt to cut off the suspect's means of escape. The officers, who were wearing their police uniforms, ordered Stevenson and his friend to stop the car and show their hands. Instead of complying, Stevenson drove first in reverse and then forward, hitting Officer Hill. Hill landed on the hood but was thrown back when the car went in reverse the second time. Then, the car moved forward in the direction of Cole. Considering themselves and each other in danger, the officers began shooting until the car had come to a stop.

In January 1997 Stevenson brought this action. He now appeals the district court's entry of judgment in favor of the District.

II. DISCUSSION

Stevenson raises three arguments on appeal. We address each in turn.

A. The District Court's Revelation of Its View of the Facts to the Jury

Stevenson's first challenge arises from a hypothetical question the district court asked a defense expert witness. After defense counsel had asked the witness several hypothetical questions, the district court interjected its own hypothetical. At a bench conference, Stevenson objected, claiming the court's hypothetical assumed as true the defendants' version of the facts. He requested that the court "issue some sort of instruction to the jury [that] they're not to assume that's your opinion of the facts or those are the facts," JA 386, and also asked the court to ask the expert a hypothetical using Stevenson's version of the facts. The district court agreed to the first request and to consider a counter-hypothetical but instructed Stevenson to provide in writing the question he wanted asked. Immediately after the bench conference, the court charged the jury that hypotheticals assumed facts that "may or may not be the facts of this case," that deciding the facts was the jury's task and "what the lawyers say are the facts, what [the judge says] are the facts, is immaterial to your decision." JA 387-88. At the end of the expert's cross-examination, Stevenson failed to provide the court with any hypothetical questions. In fact, when the court inquired whether he wanted the court to give an additional instruction, Stevenson replied "Your jury instructions were fine." JA 398. Now Stevenson contends the district court's questioning of the expert witness was reversible error.

We review the judicial questioning of a witness for abuse of discretion. *United States v. Tilghman,* 134 F.3d 414, 417 (D.C.Cir.1998). Rule 614(b) of the Federal Rules of Evidence expressly permits judges to question witnesses.[3] *Tilghman,* 134 F.3d at 416. "Judges may do so repeatedly and aggressively to

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[3] Rule 614 provides: "The court may interrogate witnesses, whether called by itself or by a party." Fed.R.Evid. 614(b).

clear up confusion and manage trials or where testimony is inarticulately or reluctantly given." *Id.* (citations and internal quotation marks omitted). Moreover, " '[t]he precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth[ ] and is not compelled to act as if he were merely presiding at a sporting match.' " *United States v. Norris,* 873 F.2d 1519, 1526 (D.C.Cir.) (quoting *United States v. Liddy,* 509 F.2d 428, 438 (D.C.Cir.1974) (*en banc*), *cert. denied,* 420 U.S. 911, 95 S.Ct. 833, 42 L.Ed.2d 842 (1975)), *cert. denied,* 493 U.S. 835 (1989).

Although, as we have noted before, "[d]istrict court authority to question witnesses and manage trials ... has limits," *Tilghman,* 134 F.3d at 416 (citing *United States v. Wyatt,* 442 F.2d 858, 859-61 (D.C.Cir.1971)), our review of the record here convinces us the district court acted well within its discretion. Stevenson received the jury instruction he requested. Moreover, despite the district court's willingness to consider asking a hypothetical question on Stevenson's behalf, Stevenson failed to provide the court with such a question. Under these circumstances, we find no fault with the district court's action.

B. Admissibility of the Gun

Stevenson's second claim involves the district court's ruling on the admissibility of a Cobray MAC 11 semiautomatic weapon taken from Wallace when he was arrested. In a motion *in limine* Stevenson argued the gun was irrelevant because the police officers did not know before the shooting that Wallace was armed and therefore the reasonableness *vel non* of their actions was not dependent on the gun's existence. Moreover, Stevenson argued that admitting the gun would be unfairly prejudicial because it would inflame the jury against him. The District countered that the MAC 11 was relevant to show "plaintiff's motivations and intent to escape at all costs," JA 57, and to contradict his assertion that he tried to flee only because "he panicked when he saw the police." JA 63. The district

court concluded Wallace's possession of the gun was "more probative than prejudicial as evidence of the plaintiff's desperation, as a convicted felon on parole ... in the presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon." JA 114.

Stevenson presses before us the same arguments he advanced before the district court. Reviewing the district court's evidentiary rulings for abuse of discretion, *United States v. Clarke,* 24 F.3d 257, 267 (D.C.Cir.1994), we conclude the district court did not abuse its discretion.

The Federal Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Under this definition, the gun is relevant because, as the District argued below, it tends to support the proposition that Stevenson was intent on escaping at all costs and in so doing placed the officers at risk. Moreover, there is no evidence in the record that the district court "gravely" abused its discretion in declining to exclude the gun under Rule 403. *See Clarke,* 24 F.3d at 265 ("We review the district court's Rule 403 determinations 'with great deference, reversing only for grave abuse" of discretion.' " (quoting *United States v. Johnson,* 970 F.2d 907, 912 (D.C.Cir.1992) (quoting *United States v. Payne,* 805 F.2d 1062, 1066 (D.C.Cir.1986)))). Although admission of the gun no doubt worked against Stevenson's interest, the risk of undue prejudice to Stevenson, we conclude, did not substantially outweigh the evidence's probative value. Finally, Stevenson's reliance on *Carter v. District of Columbia,* 795 F.2d 116 (D.C.Cir.1986), is misplaced. There the court held that the district court abused its discretion in allowing counsel to read lengthy and detailed allegations of police misconduct contained in administrative complaints, pleadings in lawsuits and newspaper articles when the sole purpose of the exercise was to test whether the witnesses were familiar with the allegations.

The same result, the court noted, could have been achieved in a less prejudicial manner. The facts here are far different. The allegedly prejudicial evidence introduced was not extensive, as it was in *Carter*. *See id.* at 126-28. Moreover, unlike the challenged evidence in *Carter,* the gun was probative of an important issue in the case, namely which version of events--Stevenson's or the officers'--was true. Accordingly, *Carter* does not win the day for Stevenson.

C. Exclusion of Impeachment Testimony

Stevenson's third argument involves another evidentiary ruling. At the conclusion of Officer Hill's testimony, Stevenson's counsel sought to cross- examine Hill about an incident in which Hill "submitted a false report and was subsequently suspended from the D.C. Police Department for 20 days." JA 375. The District objected, asserting that the incident had to do with Hill's failure to comply with a superior's orders and was irrelevant. The District requested that the court examine the report and determine its admissibility. After doing so, the court sustained the District's objection. Stevenson's counsel did not renew any attempt to cross-examine Hill about the incident. Stevenson contends the court's ruling was error.

Although the transcript reflects the exchange described above, the challenged report was not proffered into evidence. Nor does the record manifest that Stevenson was improperly barred from pursuing cross-examination and therefore we cannot say that the district court abused its discretion in sustaining the District's objection. *See Palmer v. Hoffman,* 318 U.S. 109, 116, 63 S.Ct. 477, 87 L.Ed. 645 (1943) ("Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U.S.C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted."). Accordingly, the district court's decision on this point stands.

For the foregoing reasons, the district court's judgment is *Affirmed.*

APPENDIX B

UNITED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT L. STEVENSON

Plaintiff(s)

v. Civil Action No. 97-0093

DISTRICT OF COLUMBIA
METROPOLITAN POLICE, et al.

Defendant(s)

JUDGMENT ON THE VERDICT
FOR THE DEFENDANT

This cause having been tried by the Court and a Jury, before the Honorable LOUIS F. OBERDORFER, Judge presiding, and the issues having been duly tried and the Jury having rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s):

ROBERT L. STEVENSON

take nothing on the complaint against the defendants(s):

DISTRICT OF COLUMBIA METROPOLITAN POLICE, et al.

and that the said defendant(s) have and recover costs from the said plaintiff(s).

NANCY MAYER-WHITTINGTON,
CLERK

Dated: 5/15/00 By: /s/ Jackie Francz
Deputy Clerk

APPENDIX C

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Federal Rule of Evidence 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Federal Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

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No. 01-183

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT LOUIS STEVENSON,

Petitioner,

v.

DISTRICT OF COLUMBIA
METROPOLITAN POLICE DEPARTMENT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether in this action under 42 U.S.C. § 1983 against police officers, where petitioner placed in issue his own motive for flight to evade arrest through his own testimony and his counsel's opening statement to the jury, the District Court abused its discretion in receiving physical evidence offered by the arresting officers that contradicted petitioner's testimony and counsel's statement of his motive.

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, is reported at 248 F. 3d 1187.

COUNTER-STATEMENT OF THE CASE

A. The Proceedings.

This action was filed by petitioner Robert Louis Stevenson against the District of Columbia Metropolitan Police Department (MPD) and five police officers, under 42 U.S.C. § 1983, alleging excessive force in violation of the Fourth Amendment in arresting him and stopping his flight to evade arrest. The case was tried to a jury over an eight-day period, and the jury returned verdicts in favor of the the police officers on all of Stevenson's claims. (J.A. 439-41). Stevenson challenges an evidentiary ruling that admitted a gun into evidence.

B. Background Facts.

On March 7, 1996, MPD Officer Demetrius Cole was working off-duty, but in uniform, providing security at a McDonald's restaurant in Washington, D.C. (J.A. 301). At about 9:00 p.m., Stevenson drove a 1988 Chrysler with Maryland tags into the parking lot and entered the drive-through lane; Larry J. Wallace was the passenger in the car. (J.A. 202, 302). The car had a broken rear window, which made Officer Cole suspect that it had been stolen. (J.A. 302). Cole confirmed in a telephone call to the MPD that the car had been stolen; he requested police assistance. (J.A. 302-04).

Two MPD cars, each with two officers, responded to the restaurant. Cole and two other officers approached the Chrysler from the front and blocked its path with guns drawn. (J.A. 302-04, 307, 318-19, 333-34). Two others approached from the rear. (J.A. 322-34). The officers surrounded the car and ordered Stevenson to put the car in park and to show his hands. (J.A. 308-10, 323-24). Instead of doing that, Stevenson attempted escape by driving the car away. (J.A. 310-11). What happened next is disputed.

According to the officers, Stevenson backed up the Chrysler in the direction of two of the officers, and struck the car behind him in the drive-through lane. (J.A. 310-11). He then pulled forward and to his right, and struck an officer, who landed on the hood. (J.A. 310-11, 335-39, 349-53, 356-60). Stevenson backed up again, throwing that officer off the hood, and then drove forward in the direction of that officer and another officer. (J.A. 310-11, 335-39).

The officers fired their service pistols at the Chrysler, attempting to prevent Stevenson from hitting them again. (J.A. 310-11, 317, 325-27). Stevenson then backed the Chrysler up, spun it around completely, and drove at the officer who had been behind him. (J.A. 325-27). To protect themselves from death or serious injury, the officers repeatedly fired their service pistols

at the car, wounding Stevenson and Wallace. (J.A. 310-14, 325-27). The car stopped, and they were removed from it and placed under arrest. (J.A. 312).

Stevenson admitted that he attempted to escape in the car and maneuvered it in much the manner described by the officers. (J.A. 206-07, 228, 231). He denied that he attempted to hit, or did hit, any officer and denied that any officer was endangered. (*Id.*). He argued that the use of deadly force was not necessary to protect the officers and was not permitted to prevent his escape.

The jury decided the case in favor of the District and the officers in all respects, and it must be assumed that the jury accepted the testimony of the officers. (J.A. 439-41). Stevenson did not contest the sufficiency of the evidence to support the verdict or challenge the jury instructions in the Court of Appeals.

C. The Challenged Evidentiary Rulings.

The police recovered a loaded MAC 11 submachine gun from Stevenson's car after the shooting. It is a large weapon – about 11½ inches from the muzzle to the butt and about the same distance from the top of the gun to the bottom of the magazine. (J.A. 164). Stevenson moved *in limine* to exclude any references to the machine gun at trial. (J.A. 125). Stevenson argued that the gun had no relevance, because the police officers did not know about the gun when they attempted to arrest him and to stop his flight. He asserted that its prejudicial effect would outweigh any probative value. (*Id.*).

The District argued that the gun had probative value, because it would assist in establishing Stevenson's motive in trying to escape and would cast doubt on the credibility of his statement of his motive. (J.A. 127-28). Both Stevenson and his expert witness had attributed Stevenson's attempt to flee from McDonald's as motivated by fear of the police with their drawn weapons and his being "terrorized" by the police. (*Id.*). The

District argued that the jury could reasonably infer that Stevenson sought to escape because he knew that his parole would be revoked if he were arrested with an automatic weapon in the car. (*Id.*).

The District Court denied the motion based on its finding that "Larry Wallace's possession of a gun during the events in question is more probative than prejudicial as evidence of the plaintiff's desperation, as a convicted felon on parole who is in the presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon and is admissible in the government's case in chief." (J.A. 114).[1] The gun was admitted during the testimony of the evidence technician (an MPD officer) who investigated after the shooting and collected evidence from the scene. (J.A. 292-93).

Stevenson's tactics and testimony at trial also had a bearing on the admissibility of the gun. In her opening statement, Stevenson's counsel stated her client's testimony would be that he was terrified by his encounter with the police and that was his motive for trying to escape. She said:

> He'll tell you he was terrified. He will tell you he had no idea that the tags of the car had been called in or that the tags of the car were stolen.

---

[1] As discussed below, at trial, petitioner adopted a strategy of painting himself as a "changed man" — that he had gotten into trouble as a young man due to a drug problem he developed when a soldier in Vietnam but had turned his life around and was now a "changed man." The District Court ruled that testimony he offered to support his changed man theory opened the door to "heavy cross-examination." (J.A. 218-19). It also offers substantial support for receiving the gun into evidence. Obviously, the District Court could not have anticipated this testimony and did not rely on it for its pretrial ruling.

> He'll tell you that at that moment, he had no idea why the officers were pointing their guns at him. Robert will testify that all he could think about was that the police were trying to kill him, and all he wanted to do was to get away. [J.A. 184]

Stevenson's counsel attempted to dissociate Stevenson from the gun, stressing that the evidence would show "there was a gun found on the person of Larry Wallace who was the passenger in the vehicle" after the shooting was over. (J.A. 187) .

Stevenson's counsel stated the evidence would show that Stevenson's problems with the law resulted from a drug habit that he picked up while he was a soldier in Vietnam from 1968 to 1970 and could not shake after he returned home, but that he was now a "changed man." (J. A. 187-88). Counsel stated:

> Robert has gotten in trouble over the years over crimes stemming from his drug habit ....
>
> Today as we sit here in court, however, you will hear Robert Stevenson testify that he is a changed man. He's got a family. He's got four little boys that he loves very much. He will tell you that he's educated himself. He's got a bachelor of science degree, a bachelor of arts degree, and most recently he's applied to be a member of a writing program which he plans to attend in the future. [J.A. 188]

During his direct examination, Stevenson stated that he had grown up in Washington and had attended public schools through junior high. (J.A. 196). He said he was drafted into the Army in 1968 and served in Vietnam, where he earned a bronze star; he was honorably discharged in 1970. (J.A. 196-97). He developed a drug habit and was not able to keep a job he secured as a security guard at the General Accounting Office. (*Id.*).

He said that he developed problems with the law and ended up in prison. (J.A. 197). While in prison, he earned a GED and degrees from "Coffin" (*sic*) and Morgan State universities. (J.A. 198). He said he has three children, one age 6 and twins age 5, and that at the time of trial he was still the sole means of support for these children. (J.A. 200).

He said that, on March 7, 1996, he borrowed a car from a friend and went from Anacostia with Larry Wallace to visit friends who lived in the neighborhood near Capital Hill where he grew up. (J.A. 201-02). He first met Wallace in the early 80's, and he met him again after Stevenson was paroled in about 1994. (J.A. 202-03). Stevenson denied that he had a gun but said that Wallace had told him that he had a gun with him; it was on his person but Stevenson did not know where. (J.A. 195, 202-03). On the way back from visiting their friends to return the car, Stevenson drove into the McDonald's restaurant. (J.A. 202).

Stevenson described the encounter with the police and the shooting that occurred; he said that he tried to escape because he was scared.

> Before I can take the car out of gear or figure, I notice the police car coming towards me fast with the light, siren, what have you right towards me, fast, right to me.
>
> And stop. Right in front of me. And the officers jump out with their guns drawn; this other officer comes out of the store with his gun drawn. They hollering. All of them hollering.
>
> I'm not going to show exactly the particular words they using but they hollering at me. The guns are pointing at me.
>
> *I immediately – I'm scared.* I put the car in reverse; and when I put the car in reverse, I turn it to my right to get – to take – kick the back out, because I can't go forward

> because they're in front of me, and there's some parked cars to my – to my immediate right, so I can't go around them. The only way I can go back.

(J.A. 205-06, emphasis added). Minutes later, he repeated that he tried to flee because "I just got scared and – my initial reaction was to back the car up. I was trying to get away from them. And I didn't – I just didn't believe that they were shooting." (J.A. 209).

On cross-examination, Stevenson admitted that he was currently incarcerated as a result of a conviction of an armed robbery that he committed with Larry Wallace just two days before the incident at McDonald's restaurant on which this action is based. (J.A. 220). He said that he met Larry Wallace at the Maryland penitentiary when both were incarcerated there. (J.A. 222). Both he and Wallace were convicted of the armed robbery that they committed on March 5, 1996. (J.A. 223).

Stevenson again stated that he was scared when he was surrounded by police with their weapons drawn but he did not believe they would shoot; his initial response was to get away. (J.A. 228). However, he acknowledged that he was concerned that if he "and Mr. Wallace had to get out of that car the presence of that semiautomatic weapon, that it would result in the revocation of [his] parole." (J.A. 229).

D. The Court of Appeals' Ruling.

The Court of Appeals reviewed the District Court's evidentiary ruling for an abuse of discretion; it held that the court did not abuse its discretion in ruling that the gun was admissible and in receiving it into evidence. (App. 5a-7a). The gun was "probative of an important issue in the case, namely which version of the events — Stevenson's or the officers' — was true." (App. 7a). It was relevant because "it tends to support the proposition that Stevenson was intent on escaping at all costs and in so doing placed the officers at risk." (App. 6a). The

court also affirmed the District Court's ruling that the prejudicial effect of the gun did not outweigh its probative value. (App. 6a).

REASONS FOR DENYING THE WRIT

1. Petitioner's decision in the trial court to place in issue his motivation for flight makes this case an improper vehicle for the issue he presents. Petitioner asserts that the decision of the Court of Appeals conflicts with holdings of other courts of appeal on the admissibility of the evidence of the motives of a plaintiff alleging excessive force in overcoming his flight or other resistance to arrest. He argues that if the defendant police officers were unaware of the plaintiff's motivation at the time they used force, evidence of that motivation is inadmissible hindsight evidence.

Stevenson is the party who put the question of motivation in attempting to escape at issue in the case. Stevenson's counsel stated in her opening statement that the reason he attempted to escape was that he was terrified by the police show of force and wanted to get away due to his fear. That was Stevenson's testimony at trial. It was also the motivation that Stevenson had stated during discovery and the principal ground on which the District opposed the motion *in limine* which sought exclusion of the gun; it was also the deposition testimony of his expert. (J.A. 127-28). His trial tactic was to blame the police for his flight. His theory was that the officers' show of force compelled him to flee, and the officers then used his flight to justify the force they used.

The gun was probative in offering a far different motive in fleeing from the police. When the police encountered him, Stevenson was a felon on parole who was with another felon (Wallace) who was also on parole. They were in a stolen car and had a machine gun in their possession. They had committed an armed robbery together two days earlier for which Stevenson was convicted on a plea of guilty. Getting caught with that gun would most certainly have led, at the very least, to the

revocations of their paroles. As the District Court ruled in its April 26, 2000, Order, this evidence was probative of Stevenson's "desperation, as a convicted felon on parole who is in the presence of a firearm, to avoid arrest and his intention to use his vehicle as a weapon" and of "Larry Wallace's status as a felon and his possession of a firearm" and his "motivation to encourage the plaintiff to escape the custody of the police officers at all costs." (J.A. 114). The presence of this gun and the resulting dire consequences offered substantial support for the officers' testimony that Stevenson drove at, and hit, police officers who surrounded him in a desperate attempt to get away. That is so without regard to whether the officers knew petitioner and his partner were armed.

Having placed the question of motive in issue, petitioner is not now in a position to argue that the issue was irrelevant. He invited the alleged error he now challenges and that is an important factor militating against a grant of certiorari. *Cf. United States v. Wells*, 591 U.S. 482, 488 (1997). His trial tactics made the issue relevant even if the gun were otherwise excludable.

2. Petitioner alleges that the decision of the Court of Appeals in this case directly conflicts with the decisions of other circuits. There is no such conflict. Only two of the decisions from other circuits on which petitioner relies involves or discuss a situation like we have here where a plaintiff sought to exclude evidence in order to insulate his testimony from contradiction on matters he put in issue. Those decisions support the rulings challenged here.

Petitioner asserts that information received by an officer after-the-fact cannot provide a justification for an officer's use of force. Petitioner relies on *Graham v. Conner*, 490 U.S. 386, 397 (1989) ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene."); *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7th Cir.

1997) (Officers may not justify a use of deadly force on information "not within [their] personal knowledge at the time of the shooting."). He argues the gun was inadmissible under these principles. In making this argument, petitioner fails to acknowledge that the District did not seek admission of the gun to justify the shooting nor did the court below admit it for that purpose. The gun was offered and admitted because it offered strong evidentiary support for the officers' version of the facts – that appellant hit one officer and endangered others in his frantic attempt to escape their attempt to arrest him.

In addition to the testimony on his motive for escape, Stevenson and his attorneys adopted a trial strategy of attempting to paint Stevenson as being something he was not. They attempted to show that Stevenson had gotten into trouble with the law as a result of a drug problem he picked up while a soldier in Vietnam. His counsel stated that he was now a "changed man." In his testimony at trial, Stevenson omitted the fact that he was incarcerated. He stated that he was then the sole support of his three children and testified concerning his educational accomplishments during an earlier incarceration. In fact, he was not a "changed man." He had committed an armed robbery with Larry Wallace just two days prior to the incident at the McDonald's restaurant. The fact that they were together two days later in a stolen car with a machine gun in their possession gave the jury a basis to evaluate this claim of reform. This is the last day he was a free man, because he was incarcerated from that day until the day of trial. Again, appellant is the party who put this matter at issue. The gun was admissible to counter the "changed man" testimony as well as the testimony that he attempted escape because he was "terrorized" by the police.

We do not believe there is authority from other circuits to exclude this evidence under these circumstances. For example, petitioner argues that the Seventh Circuit excludes all evidence relating to whether the plaintiff was armed and of his motive to resist arrest where that information was unknown to the officer

at the time of the use of force, even when the fact of resistance is disputed. He asserts that the law of the Seventh Circuit is that "when considering a charge of excessive force, evidence outside the time frame of the shooting is irrelevant and prejudicial." *Palmquist v. Selvik*, *supra*, 111 F.3d at 1339 (citing *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (*en banc*).

However, in its leading case, the *en banc* decision in *Sherrod v. Berry*, the Seventh Circuit explicitly stated that its decision "should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a § 1983 violation was unarmed at the time of the incident." 806 F.2d at 806. The Court stated that a weapon would be admissible for precisely the reason it was allowed in evidence here by the District Court. The Court stated a gun could be introduced to challenge "the credibility of a witness" which "can always be attacked" and that "impeachment by contradiction is a technique well recognized in the federal courts by which specific errors in the witnesses's testimony are brought to the attention of the trier of fact." Id.. citing, 3 Weinstein's Evidence ¶607[04] p. 607-55 and ¶ 607[05] p. 607-76. These are the grounds on which the District Court exercised its discretion to admit the gun into evidence.

In light of *Sherrod*, petitioner's heavy reliance on decisions of the Seventh Circuit as allegedly conflicting is plainly misplaced. Similarly, the decision of the Eighth Circuit in *Cummings v. Malone*, 995 F.817 (8th Cir. 1993), does not conflict with the decision here. Instead, it supports the challenged evidentiary ruling. There, the plaintiff, a prison inmate, raped a female guard. Shortly after the guard reported the rape, the plaintiff was called into a prison investigator's office for questioning regarding the rape. He alleged that he was severely beaten by a number of prison guards and other prison officials during the questioning. Prior to trial, the District Court excluded all references to the rape allegation; to convictions for

assault and attempted rape of the female guard; and assaulting another (male) guard on the same day. 995 F.2d at 823. The District Court ruled that this evidence was not relevant to the question of whether the guards had assaulted the plaintiff and that it was unduly prejudicial. *Id.*

At trial, the plaintiff testified in his direct examination that he did not know that guards took him to the investigator's office. 995 F.2d at 824. This testimony was contrary to his deposition testimony and to the allegations in his complaint, which were that he was taken there for questioning about the rape. *Id.* He also testified that he did not assault the male guard. *Id.* However, he had been convicted of assaulting him. *Id.* The District Court refused to permit evidence countering this testimony, relying on its pretrial ruling. *Id.* at 824-25.

On appeal, the Eighth Circuit held that the District Court did not abuse its discretion when it entered the pretrial order excluding references to the rape and the convictions for assault and attempted rape. 995 F.2d at 823-24. However, it held that "the district court committed reversible error in excluding testimony about the sexual assault conviction once Cummings [the plaintiff] 'opened the door' to these issues on direct examination." *Id.* at 823. The court erred in refusing to allow the prior inconsistent statements, evidence of the conviction of assault, and specific felony convictions. *Id.* at 827.

Here, these principles of curative admissibility apply with special force. Petitioner went much further than did the plaintiff in *Cummings*. Petitioner's trial strategy was first to blame the police for his decision to attempt escape. Then he tried to convince the jury that he had gotten into trouble when he was young to support a drug habit he had acquired in Vietnam, but he is now a "changed man." The District and the officers were entitled to counter the testimony he offered to advance these strategies. The gun was important in that effort, and the District Court did not abuse its discretion in receiving it into evidence.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ROBERT LOUIS STEVENSON,

Petitioner,

v.

THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, THE DISTRICT OF COLUMBIA, ALBERT GONZALES, ALAN HILL, JOHNNY GAY, LEWIS HAGLER, AND DEMETRIUS COLE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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October 1, 2001

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INTRODUCTION

The Brief in Opposition makes no serious attempt to reconcile the conflicting decisions of the various courts of appeals. Nor does it dispute the exceptional importance of the D.C. Circuit's holding. Instead, the government claims that the submachine gun was admissible because Mr. Stevenson supposedly put his motivation for escape at issue and thereby opened the door to the admission of the gun. Neither the district court nor the court of appeals accepted this baseless argument, and there is no reason for this Court to do so. The government cannot obscure the important circuit split by raising a meritless procedural argument that no other court has accepted.

I. THE D.C. CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON A QUESTION OF EXCEPTIONAL IMPORTANCE.

Notwithstanding the government's attempt to recast this case as one based on an "opening the door" rationale, the D.C. Circuit's actual holding conflicts with decisions of other circuits on an important question of federal law. Like the district court, the D.C. Circuit held that the gun was admissible as evidence of Mr. Stevenson's motive for fleeing from the police. *See* App. 6a (holding that the gun was admissible as to the question whether "Stevenson was intent on escaping at all costs"); JA 114 (district court order admitting the gun as "evidence of the plaintiff's desperation . . . to avoid arrest and his intention to use his vehicle as a weapon"). Unlike the D.C. Circuit, a number of other circuits have held that if the defendants were unaware of the plaintiff's motivation for resisting arrest at the time they used deadly force, evidence of that motivation is inadmissible hindsight evidence. *See* Pet. 6-9.

The government does not seriously dispute this point. Indeed, the government does not even cite, much less attempt to distinguish, the First Circuit cases on which Mr. Stevenson

relied. *See* Pet. 7-8 (citing *Wierstak v. Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986); *Senra v. Cunningham*, 9 F.3d 168, 172 (1st Cir. 1993)). The government at least attempts to distinguish the Eighth Circuit authority cited by Mr. Stevenson, but only by reference to its procedural argument that Mr. Stevenson opened the door to the admission of the gun. *See* Opp. 11-12 (discussing *Cummings v. Malone*, 995 F.2d 817, 823 (8th Cir. 1993)). Significantly, the government does not (and can not) deny that the actual *holdings* of the D.C. and Eighth Circuits are in conflict. Finally, the government purports to distinguish the Seventh Circuit's decision in *Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997), but it does so only by attempting to distinguish an *earlier* decision of that court, *Sherrod v. Berry*, 856 F.2d 802, 807 (7th Cir. 1988) (*en banc*). *See* Opp. 11. Of course, no amount of distinguishing of one case can detract from the square conflict with the other.

As explained in the petition, and not disputed by the government, this circuit split addresses a matter of exceptional importance. The D.C. Circuit's holding deprives excessive force victims of the right to a fair trial by subjecting the jury to extraneous but highly prejudicial information. *See* Pet. 10-11. Accordingly, this Court's guidance is needed not only to reconcile the circuit conflict, but also to allow excessive force victims like Mr. Stevenson to receive fair trials.

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR THE RESOLUTION OF THIS IMPORTANT CONFLICT.

This case provides an excellent vehicle for the resolution of this conflict because the error was anything but harmless. All of the neutral eyewitnesses testified in favor of Mr. Stevenson, yet the jury returned a verdict for the defense after it was shown Mr. Wallace's very large submachine gun and heard repeated testimony regarding that gun. *See* Pet. 3, 9, 11. Accordingly, the government does not even attempt to argue that the error was harmless, and the D.C. Circuit did not rely on any such

rationale.

Nonetheless, the government argues that "Petitioner's decision in the trial court to place in issue his motivation for flight makes this case an improper vehicle for the issue he presents." Opp. 8. This argument is fanciful. The government did not raise it in the district court, and the district court did not rely on any such theory. *See* JA 116. When the government raised this contention in the court of appeals, the D.C. Circuit simply ignored it. The D.C. Circuit obviously considered the government's procedural arguments, for it held that Mr. Stevenson had not properly preserved one of his other arguments. *See* App. 7a. But the court addressed *this* issue on the merits precisely because it is properly presented.

As Mr. Stevenson explained in the court of appeals, there are a host of reasons the government's "opening the door" rationale must be rejected. *See* Appellant's Reply Br. 14-19. The simplest reason is that this is not the way in which the evidence was actually admitted or used at trial. The "opening the door" doctrine (also known as the doctrine of curative admissibility) applies "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued" from the admission of "inadmissible or irrelevant evidence." *United States v. Brown,* 921 F.2d 1304, 1307 (D.C. Cir. 1990) (internal quotation omitted); *accord United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993). But the government's counsel raised the gun affirmatively, not curatively, before Mr. Stevenson introduced any evidence at all. Indeed, during his opening statement, and in his very *first* mention of the officers' encounter with Mr. Stevenson, the government's counsel dropped this bomb: "Officer Hill will tell you that as he is coming toward the car in which Mr. Stevenson is seated with Mr. Wallace *and with a semiautomatic Mac 11 submachine gun* . . . ." JA 191 (emphasis added); *see also id.* at 192 (stating that after the police stopped shooting, "a crime scene search officer there yelled out gun, gun; and the technicians backed off, and what they had found was this semiautomatic Mac 11 under and

coming from the garments of Mr. Wallace"). As this argument reflects, evidence regarding the gun was not admitted on a curative admissibility theory, and its use was not limited to such a theory. Accordingly, the admission of this evidence in this case cannot be justified on that basis. *See, e.g., United States v. Shue*, 766 F.2d 1122, 1130 (7th Cir. 1985) (citing cases).

Even more fundamentally, the District is wrong to argue that Mr. Stevenson opened the door to such devastating evidence by testifying that he was scared during the incident. The testimony at issue is the following: "I immediately – I'm scared," and "I just got scared and – my initial reaction was to back the car up. I was trying to get away from them." JA 206, 209. Such general and unsurprising background statements in the context of a narrative description of the key events in dispute could not possibly open the door to specific prejudicial inquiries into the various reasons Mr. Stevenson had to fear the police. *See, e.g., Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 967 (7th Cir. 1996) (holding that testimony regarding "general information" did not open the door to "specific" prejudicial information); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496 (8th Cir. 1993) (holding that generalized testimony did not open the door to admission of other specific prejudicial instances). To the contrary, the only point made by Mr. Stevenson was the obvious one that he was scared, and that point was neither disputed at trial nor inconsistent with Mr. Wallace's possession of a gun.

The government's reliance on *Cummings* and *Sherrod* serves only to underscore this point. In *Cummings*, the Eighth Circuit held that prior inconsistent statements were admissible because they "directly contradicted" the defendant's trial testimony. 995 F.2d at 825. In contrast, Mr. Stevenson's statement that he was "afraid" of the armed officers who surrounded his car is not in any way contradicted by Mr. Wallace's possession of a gun. Thus, the "opening the door" rationale is inapplicable.

Similarly, the government is wrong to argue that *Sherrod* holds "that a weapon would be admissible for precisely the

reason it was allowed in evidence here by the District Court . . . to challenge 'the credibility of a witness.'" Opp. 11. As explained above, this is *not* the reason the district court admitted the evidence. Moreover, *Sherrod* states only that "'impeachment by contradiction is a technique well recognized in the federal courts by which *specific errors* in [a] witness['s] testimony are brought to the attention of the trier of fact.'" Opp. 11 (citing *Sherrod,* 856 F.2d at 806) (emphasis added). In this case, Mr. Stevenson never denied that a gun was in the car, and thus never opened himself up to impeachment on that point.

CONCLUSION

The government's meritless procedural argument cannot disguise the square conflict on this important question of federal law. Accordingly, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted,

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